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In the Supreme Court of the United States

OCTOBER TERM, 1994

WAYNE F. CROSS,
PETITIONER,

v.

MICHAEL CUNNINGHAM, WARDEN
THE NEW HAMPSHIRE STATE PRISON,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

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QUESTION PRESENTED

The Interstate Agreement on Detainers requires a receiving state to return a prisoner to his program of rehabilitation in the sending state "at the earliest practicable time" following prosecution of the untried indictment so as to minimize disruption of the prisoner's rehabilitation program in the sending state. Does this interstate compact permit the receiving state to refuse to comply with that mandate solely because the prisoner has appealed his conviction?

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Wayne F. Cross respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Hampshire Supreme Court, entered in the above-entitled case on June 27, 1994 (motion for rehearing denied on July 28, 1994).

OPINION BELOW

The New Hampshire Supreme Court's decision (Brock, C.J.) is reported at __ N.H.__ and 644 A.2d 542 and is reprinted in the Appendix hereto ("App."), pp. A-1 to A-6.

JURISDICTION

Petitioner commenced this action in New Hampshire state court by filing in Hillsborough County Superior Court a Petition for Writ of Habeas Corpus and for Declaratory Judgment and Injunctive Relief pursuant to N.H. Rev. Stat. Ann. §§ 491:22 and 498:1-2. On defendant's motion, that court subsequently dismissed the petition. Petitioner then directly appealed that ruling to the New Hampshire Supreme Court. On June 27, 1994, the New Hampshire Supreme Court affirmed the dismissal. *See* App., pp. A-1 to A-9. Petitioner's motion for rehearing was denied by the New Hampshire Supreme Court on July 28, 1994. *See* App., p. A-10.

This Court has jurisdiction to review the judgment of the New Hampshire Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The Interstate Agreement on Detainers is codified at 18 U.S.C. App. § 2.

N.H. Rev. Stat. Ann. § 606-A, New Hampshire's enactment of the Interstate Agreement on Detainers, provides in material part:

> *606-A:1 Agreement Enacted. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows: The contracting states solemnly agree that:*
>
> *Article I*
>
> *The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties*

which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

. . . .

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . .

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated . . . .

(c) In respect to any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state . . . .

Article V

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction . . . .

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

. . . .

Article IX

This agreement shall be liberally construed so as to effectuate its purposes . . . .

606-A:5 Duty of Warden. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

STATEMENT OF THE CASE

This case arises from the conduct of New Hampshire prison authorities in contravention of the Interstate Agreement on Detainers ("IAD"). In substance, New Hampshire prison authorities penalized petitioner Wayne F. Cross by depriving him of rights and protections otherwise afforded him under the IAD. They did so solely because he exercised his right to appeal his underlying conviction. Mr. Cross accordingly sought relief (including the vacation of his convictions and sentences pursuant to the remedial provisions

of the IAD) by a writ of habeas corpus under New Hampshire law and by a claim under 12 U.S.C. § 1983. *See* App., pp. A-14 to A-28.

Background

The principal purpose of the IAD is to minimize disruption to a prisoner's program of rehabilitation in prison by ensuring that trials on criminal charges against the prisoner in another jurisdiction are swiftly commenced and that, after the trial is over, the prisoner is then promptly returned to continue his program of rehabilitation. *See infra* 2-4.

While serving a sentence as a prisoner in the Massachusetts prison system in 1983, Mr. Cross engaged in both a drug/alcohol abuse rehabilitation program and a vocational education rehabilitation program. His continuing participation in the vocational education program, in particular, was geared toward allowing him to earn the work-credit hours needed to obtain his journeyman's electrician's license so that he would have a trade when he completed his time in prison. *See* App., p. A-16.

During this time, Mr. Cross learned that the State of New Hampshire had indicted him for his alleged involvement in two bank robberies. Mr. Cross invoked his rights under the IAD and requested transfer to New Hampshire for disposition of the pending indictments. New Hampshire, in turn, assumed custody of Mr. Cross for this purpose, expressly under the terms and conditions of the IAD. *See* App., pp. A-16 to A-17.

After a year of pretrial and trial delays in the New Hampshire proceedings, Mr. Cross was convicted on December 5, 1984 on two counts of bank robbery. Shortly thereafter, the New Hampshire court sentenced him to two consecutive 7½-15 year sentences at the New Hampshire State Prison. *See* App., pp. A-17 to A-18.

Mr. Cross then appealed his convictions to the New Hampshire Supreme Court. At the same time, he requested to be returned to prison in Massachusetts to continue serving his Massachusetts sentence and to resume his rehabilitation programs, as provided by the IAD. Notably, the New Hampshire State Prison did not offer the types of vocational training programs in the electrical trade in which Mr. Cross had participated while incarcerated in Massachusetts. *See* App., p. A-18.

The New Hampshire prison authorities refused to return Mr. Cross to Massachusetts, citing as the only reason for their refusal Mr. Cross's appeal of his convictions. The authorities expressed the purported concern that if they were to return Mr. Cross to Massachusetts during the pendency of his appeal, then Mr. Cross might be able to invoke the anti-shuttling provisions of the IAD to avoid a new trial should the New Hampshire Supreme Court overturn his convictions. They claimed to doubt whether the IAD extradition waiver that Mr. Cross had previously given to effect his initial transfer to New Hampshire for trial was sufficient to secure his presence in New Hampshire for a retrial if necessary.[1] *See* App., pp. A-18 to A-20.

Mr. Cross consistently maintained that the New Hampshire authorities had no discretion to continue to hold him in New Hampshire pending his appeal, and that the IAD required that he be returned to Massachusetts directly after sentencing. Mr. Cross also maintained that the initial waiver he had given was fully adequate to secure his return in the event of a retrial. As the refusal by New Hampshire authorities dragged on, Mr. Cross nonetheless eventually offered to give the New Hampshire authorities whatever additional waivers they wanted (although maintaining that none were necessary). Despite Mr. Cross's requests to be returned to Massachusetts and his offer to sign even an additional waiver, the New Hampshire authorities refused to return him to Massachusetts while his appeal remained pending. *See* App., pp. A-18 to A-21.

On December 5, 1986, the New Hampshire Supreme Court affirmed Mr. Cross's convictions. Only at that juncture did the warden of the New Hampshire State Prison finally allow Mr. Cross to return to Massachusetts -- 22 months after he was sentenced and his trial was complete. *See* App., p. A-21.

Upon his return to the Massachusetts prison system, Mr. Cross resumed his rehabilitation programs. On December 18, 1987, New Hampshire

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[1] In the IAD agreement that Mr. Cross signed to be brought to New Hampshire, Mr. Cross specifically agreed to a "waiver of extradition with respect to any charge or proceeding contemplated [t]hereby," and "consent[ed] . . . to the production of [his] body in any court where . . . required in order to effectuate the purposes of the Agreement on Detainers." *See* App., p. A-32.

authorities took steps to continue to enforce Mr. Cross's New Hampshire convictions and sentences, by lodging a detainer in Massachusetts for Mr. Cross's return to New Hampshire to serve out his sentence on the bank robbery convictions following completion of his Massachusetts sentence. Upon the imminent completion of Mr. Cross's Massachusetts sentence, New Hampshire authorities invoked this detainer. On May 22, 1992, they transported Mr. Cross to the New Hampshire State Prison to serve out his remaining New Hampshire time. Mr. Cross fell approximately 400 work-credit hours (*i.e.*, four month's worth) short of the hours necessary to obtain his journeyman's license to work as an electrician. *See* App., pp. A-21 to A-22 and A-66.

After his return to New Hampshire, Mr. Cross filed his petition for a writ of habeas corpus from the New Hampshire state court. Michael Cunningham, the warden of the New Hampshire State Prison, was named as a defendant in that proceeding. Mr. Cross sought as his relief, in effect, an order vacating his New Hampshire convictions and the remainder of his New Hampshire sentences, due to the IAD and constitutional violations alleged in the petition. *See* App., pp. A-14 to A-65.

On November 20, 1992, the Hillsborough County Superior Court granted the warden's motion to dismiss Mr. Cross's petition with the mere notation:

> Defendant's memorandum in support of his motion to dismiss is adopted by this court as an accurate statement of the facts and applicable law. The motion to dismiss is accordingly granted.

See App., pp. A-11 to A-12.

Mr. Cross then appealed the dismissal directly to the New Hampshire Supreme Court. On June 27, that Court affirmed the dismissal, holding:

> Absent the petitioner's specific waiver agreeing to be returned to the State if his appeal resulted in a new trial, we conclude that the State was justified in delaying his return to Massachusetts. The petitioner was returned to Massachusetts at the earliest possible time consistent

> with the expeditions and orderly disposition of the bank robbery charges against him.

See App., p. A-8. The New Hampshire Supreme Court noted that "we need not decide in this case when the 'final disposition of an untried indictment' occurs since we find that the State's concern over the petitioner's extradition waiver was justified." App., p. A-7. Mr. Cross's motion for rehearing was denied on July 28, 1994.

REASONS FOR GRANTING THE WRIT

As this Court recently observed, "[t]he IAD's purpose -- providing a nationally uniform means of transferring prisoners between jurisdictions -- can be effectuated only by nationally uniform interpretation." *Reed* v. *Farley*, ___ U.S. ___, 114 S. Ct. 2291, 2297 (1994). The New Hampshire Supreme Court's interpretation of the IAD -- specifically, its failure to recognize that the IAD requires return of the prisoner to the sending jurisdiction after trial and sentencing -- conflicts with the reported decisions of other state courts of last resort. The petition should be granted so that the Court can resolve the conflict.

This petition should be granted for a second reason. While the IAD is indeed state law, it is a law of the United States as well. *Reed* v. *Farley*, ___ U.S. ___, 114 S. Ct. 2291, 2296 (1994), *citing Carchman* v. *Nash*, 473 U.S. 716, 719 (1985)(the IAD "is a congressionally sanctioned interstate compact within the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, and thus is a federal law subject to federal construction"); *Cuyler* v. *Adams*, 449 U.S. 433, 438-442 (1981)("congressional consent transforms an interstate compact . . . into a law of the United States"). This case presents for review a situation where a prisoner's rights under the IAD intersects with his right to appeal his conviction, and as such raises an important federal question for review. Through its interpretation of this interstate compact, the New Hampshire Supreme Court has run roughshod over the main purpose of the statute -- to minimize disruptions in a prisoner's rehabilitation program by requiring the speedy and efficient disposition of untried indictments in other jurisdictions. In doing so, the New Hampshire Supreme Court also has engrafted onto the IAD a new procedural requirement nowhere found in the interstate compact,

which new requirement unnecessarily burdens prisoners and prison officials alike. These features of the New Hampshire Supreme Court's decision -- the evisceration of a federal statute's purpose and the judicial legislation of new procedural burdens -- heighten the importance of the federal question presented for review.

I. THE NEW HAMPSHIRE SUPREME COURT'S CONSTRUCTION OF THE IAD CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONSIDERING WHEN A PRISONER IS TO BE RETURNED TO THE SENDING JURISDICTION.

In determining whether to grant certiorari to reconsider the ruling of a state court of last resort, one of the factors this Court considers is whether the state court has decided a federal question in a way that conflicts with the decision of another state court of last resort. *Sup. Ct. R. 10.1(b).* This rule is intended to permit the Court to resolve splits in authority to ensure the uniform interpretation of federal law. *See Metheny v. Hamby,* 488 U.S. 913, 915 (1988) (White, J. dissenting from denial of certiorari) (presenting the issue whether violations of the IAD are cognizable in federal habeas corpus proceedings; observing that "where cases present issues over which the Federal and State courts have divided, this Court has a special obligation to intercede and provide some definitive resolution of the issues").

This "special obligation to intercede" is particularly pressing where uniform interpretation of a federal statutory scheme is critical to effectuating its purpose. *See Turnbow v. Comm'r. of Internal Revenue,* 368 U.S. 337, 339 (1961) (certiorari granted "[t]o resolve [a] conflict, on a matter of importance to the proper interpretation and uniform application of the Internal Revenue laws"); *United States v. Robinson,* 361 U.S. 220, 222 (1960) (certiorari granted because of "the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure"); *Davis v. Virginian Ry. Co.,* 361 U.S. 354, 355 (1960) (certiorari granted to decide question involving the Federal Employers' Liability Act because of the importance of the uniform administration of the Act).

As noted above, "[t]he IAD's purpose -- providing a nationally uniform means of transferring prisoners between jurisdictions -- can be effectuated

only by nationally uniform interpretation." *Reed v. Farley*, ___ *U.S.* ___, 114 S. Ct. 2291, 2297 (1994). Thus, in addition to this Court's general interest in overseeing the consistent administration of all federal law, the Court should have an even keener interest in this matter because the effectiveness of the IAD hinges on uniform interpretation.

Indeed, this Court has frequently granted certiorari to resolve splits of authority concerning the proper interpretation of the IAD. *See, e.g., Reed*, 114 S. Ct. at 2296 (1994) (granting certiorari "to resolve a conflict among the Courts of Appeals on the availability of habeas review of IAD speedy trial claims"); *Carchman v. Nash*, 473 U.S. 716, 724 n.3 (1985) (acknowledging that certiorari was granted due to split among the decisions of federal courts, state intermediate appellate courts and state courts of last resort concerning the question whether charges of a probation violation amounted an "untried indictment, information or complaint" within the meaning of the IAD); *Cuyler v. Adams*, 449 U.S. 433, 435 (1981) (observing that certiorari was granted to resolve a conflict among state and federal courts as to whether a prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that Act before being transferred to another jurisdiction pursuant to Article IV of the IAD); *United States v. Mauro*, 436 U.S. 340, 348 (1978) (observing that certiorari was granted due to a split among the Federal Courts of Appeals as to whether the IAD governs the use of writs of habeas corpus ad prosequendum by the United States to obtain state prisoners).

In this case, the New Hampshire Supreme Court has rendered a decision that conflicts with the decisions of at least two other state courts of last resort, as well as a state intermediate appellate court. Contrary to these decisions, the New Hampshire Supreme Court has ruled that the "earliest practicable time" at which a prisoner must be sent back to the sending state will not occur promptly after trial if the prisoner claims an appeal. According to the New Hampshire Supreme Court, if the prisoner undertakes a challenge of the

underlying conviction by filing an appeal, the prisoner loses the right of prompt return to the sending state.[2]

This result conflicts with the clear holdings of other state courts, which have determined that the "earliest practicable time" occurs immediately after conviction and sentencing, and that the period of "temporary custody" afforded to the receiving state under the IAD does not include post-conviction appeals. The Court thus can, and should, exercise its discretion to resolve the conflict.

For example, in *Hearn v. State*, 642 P.2d 757 (Utah 1982), a prisoner objected that he had continued to be held in the receiving state for two months following sentencing. The Utah Supreme Court expressly noted that the IAD "requires that the receiving state . . . return [the prisoner] to the sending state immediately after his trial," and that the receiving state has an "obligation[]" to do so following imposition of the sentence. *Id.* at 758.[3]

Likewise, the Maine Supreme Court in *Joubert v. McKernan*, 588 A.2d 748 (Me. 1991) expressly held that an appeal of the conviction makes no difference in the requirement of a prompt return. In *Joubert*, the court held that both the IAD *and* the Uniform Criminal Extradition Act independently required that a prisoner be returned to the sending state immediately after sentencing, even where the prisoner had appealed, and even where the prisoner *wished to remain* in the receiving state pending the appeal. *Joubert*, 588 A.2d at 749-51. The court explained that requiring that the prisoner be returned to the sending state "[a]t the earliest practicable time consonant with the purposes of this agreement" meant that the return had to occur at the

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[2] The New Hampshire Supreme Court purported to sidestep the question of when the "'final disposition of an untried indictment'" occurs since "the State's concern over the petitioner's initial extradition waiver was justified." App., p. A-7. Nevertheless, by requiring an *additional* waiver when a prisoner appeals his conviction, the New Hampshire Supreme Court effectively determined that the "earliest practicable time" may not necessarily occur until after the appeal has been decided, at least in the state court.

[3] In *Hearn*, because the two-month delay was so short and apparently inadvertent, the court declined to afford any relief. *Hearn*, 642 P.2d at 758-59. In this case, by contrast, the delay was for almost two years, was willful, and imposed clear prejudice. *See infra* App., pp. A-21 to A-22, A-66.

"termination of prosecution," which, the court held, took place at "the entry of judgment after sentencing at the trial court level." *Id.* at 751. If, as in *Joubert*, a prisoner wishing to remain in the receiving state pending his appeal may not do so, then, *a fortiori*, a prisoner who demands to be returned -- as did Mr. Cross in this case -- cannot lawfully be retained.

Similarly, the court in *State v. Jefferson*, 574 A.2d 918 (Md. Ct. App. 1990) dealt with a situation where a prisoner had been convicted, sentenced, and taken an appeal (which, in the circumstances of that case, constituted a de novo trial). The prisoner then objected when, notwithstanding the pendency of the appeal, he was sent back to the original jurisdiction immediately after sentencing. *Id.* at 918-19. The court, however, specifically rejected any such complaint. *Id.* at 921-22. As the court noted, the IAD "only requires that a 'trial' be 'had' on the charges. *Had the IAD intended to require that the receiving state hold a prisoner until all appeals were exhausted*, rather than just until completion of the trial, *it would have said so in no uncertain language.*" *Id.* at 922 (emphasis added). The court thus found nothing in the IAD that contemplated retaining custody of a prisoner pending any appeal. *Id.* at 921.

There exists, therefore, a direct conflict between these cases and the New Hampshire Supreme Court's decision in this case. No other case holds that the "temporary custody" of the receiving state under the IAD includes appeal periods -- for good and fundamentally important reasons, in light of the purpose of the interstate compact. *See infra* pp. 2-4. The Court should grant the petition to resolve this conflict and to decide whether a receiving state is permitted to refuse to return the prisoner to his rehabilitation program in the sending state after trial and sentencing solely because the prisoner has appealed his conviction.

II. THE NEW HAMPSHIRE SUPREME COURT'S CONSTRUCTION OF THE IAD RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

A. THE DECISION BELOW EVISCERATES ONE OF THE IAD'S STATUTORY PURPOSES BY ALLOWING PRISON AUTHORITIES TO UNNECESSARILY PROLONG DISRUPTIONS IN A PRISONER'S REHABILITATION PROGRAMS IN THE SENDING JURISDICTION.

Apart from the conflict among the courts generated by the New Hampshire Supreme Court's decision, this Court should grant certiorari for a second reason -- this case presents an important federal question for review, *i.e.*, the interpretation of the IAD so as to effectuate its purposes.

The IAD is an interstate compact initially proposed in 1956 to protect the rehabilitation interests of prisoners transferred from one state to another for trial. *United States* v. *Mauro*, 436 U.S. 340, 350-51 (1978). As recently noted by the First Circuit, "the prisoner's rehabilitation efforts [are] the main purpose of the Act." *United States* v. *Daniels*, 3 F.3d 25, 27 (1st Cir. 1993). The IAD protects a prisoner's rehabilitation interests in part by minimizing the length of the disruption caused by the trial, through two specific types of protections. First, it requires that the trial commence within a specific amount of time. N.H. Rev. Stat. Ann. 606-A:1, Articles II(a) and IV(c). Second, it requires that the prisoner be returned to the sending state "[a]t the earliest practicable time" after the trial has been prosecuted. N.H. Rev. Stat. Ann. 606-A:1, Article V(e). Both protections are necessary to achieve the IAD's purpose to minimize the disruption of the prisoner's rehabilitation program in the sending state. *See Walker* v. *King*, 448 F. Supp. 580, 584 (S.D.N.Y. 1978)(the IAD is intended to "protect prisoners and [the] programs for their rehabilitation" by "minimizing interruptions in the rehabilitative program in which the prisoner is engaged").

The plain language of the IAD makes clear that New Hampshire only had "temporary custody" of Mr. Cross for the "prosecution" of the "untried indictments" at issue, and was required to return him to the sending jurisdiction "at the earliest practicable time" thereafter. Under the IAD, once

the indictment has been tried, the custody afforded by the IAD expires. This point is particularly well-articulated in *United States* v. *Coffman*, 905 F.2d 330 (10th Cir. 1990), where the court was confronted with the question of whether "trial" under the IAD includes sentencing. Finding that "trial" meant "trial" and no more, the court explained:

> [W]e decline to adopt a mechanical reading of the IAD that would require a receiving state to retain custody of the prisoner until the completion of sentencing. Such retained custody, which might last for a period of several weeks or months, *could seriously disrupt the prisoner's rehabilitative program in the sending state*. Given the IAD's policy of facilitating rehabilitation and the diminished uncertainty resulting from unsentenced versus untried charges, we refuse to hold that trial includes sentencing and require receiving states to retain custody at the expense of the prisoner's rehabilitation program in the sending state.

905 F.2d at 333 (emphasis added). *Accord Moody* v. *Corsentino*, 843 P.2d 1355, 1369-72 (Colo. 1993)(holding that "trial" under the IAD does not include sentencing).

Other courts, too, have recognized that protecting a prisoner's rehabilitation program is the IAD's paramount concern:

> the [IAD] is designed to insure that interruptions of the sending jurisdiction's incarceration are minimized so that the prisoner's continuous physical presence in rehabilitative programs at the state institution from which he is removed to face charges elsewhere, will be maximized.

United States v. *Chico*, 558 F.2d 1047, 1049 (2d Cir. 1977), *cert. denied*, 436 U.S. 947 (1978) (internal quotations omitted); *see also State* v. *Burrus*, 729 P.2d 926, 934 (Ariz. Ct. App.)(IAD is intended to protect participation in education and rehabilitation programs in sending state), *modified on other grounds*, 729 P.2d 935 (Ariz. 1986); *State* v. *Grizzell*, 399 So.2d 1091, 1092 (Fla. Dist. Ct. App. 1981)("stated purpose of the [IAD] [is] to 'prevent excessive interference with the prisoner's rehabilitation in a state prison system'"); *Neville* v. *Friedman*, 367 N.E.2d 1341 (Ill. 1977)(same), *cert.*

denied, 437 U.S. 903 (1978). The purpose of the IAD, in other words, is to ensure that a prisoner who is sent to another state for trial *gets* that trial *and is speedily returned.*

In construing the IAD to allow a post-sentence delay of *up to 22-months* before returning a prisoner to the sending state, the New Hampshire Supreme Court thwarted the statute's very purpose. *State* v. *Grizzell*, 399 So.2d 1091, 1093 (Fla. Dist. Ct. App. 1981)(noting that retaining a prisoner during an appeal, which in that case lasted 20 months, "would clearly have been excessive interference with his rehabilitation in the [sending state's] prison system"). Given that the statute contemplates that a trial must occur within six months at the latest (so as to ensure a speedy return), it makes no sense to construe the statute as permitting (as in this case) a post-sentence delay of up to twenty-two months, *i.e.*, a post-sentence delay that is *four times as long* as the statutory maximum for pre-trial delay. The New Hampshire Supreme Court's construction of the IAD allowing such an open-ended post-sentence delay squarely contravenes the statute's purpose and should not be permitted to stand.

B. THE NEW HAMPSHIRE SUPREME COURT'S DECISION ENGRAFTS A NEW PROCEDURAL REQUIREMENT ONTO THE IAD THAT NEEDLESSLY BURDENS PRISONERS AND PRISON AUTHORITIES ALIKE.

In affirming the Superior Court's dismissal of Mr. Cross's habeas petition, the New Hampshire Supreme Court cited Mr. Cross's failure to execute a specific waiver agreeing to return to New Hampshire for a retrial if his appeal was successful and his conviction overturned. Specifically, that court held:

> Absent the petitioner's specific waiver agreeing to be returned to the State if his appeal resulted in a new trial, we conclude that the State was justified in delaying his return to Massachusetts. The petitioner was returned to Massachusetts at the earliest practicable time consistent with the expeditious and orderly disposition of the bank robbery charges against him.

See App., p. A-6. The New Hampshire Supreme Court, therefore, necessarily found that Mr. Cross's initial waiver -- the waiver that brought him from Massachusetts to New Hampshire to be tried in the first place -- would not be sufficient to permit the New Hampshire authorities to regain custody over Mr. Cross if his convictions were overturned on appeal and the New Hampshire authorities then sought to retry Mr. Cross on the same charges. According to the court, *an additional* waiver was required.

Petitioner has found no other court taking such an extreme position, and for good reason. There is nothing in the IAD that requires an additional prisoner waiver or that even acknowledges that an additional waiver is possible. Indeed, the statute contemplates only the original waiver by which the trial process begins. Thus, the New Hampshire Supreme Court, by "finding" that an additional waiver is required before a prisoner who appeals his conviction can be returned to the sending state and his program of rehabilitation, has engaged in judicial legislation by fiat, unnecessarily burdening prisoners and prison officials alike. Following this precedent, no longer can a state return to the sending state a prisoner who appeals his conviction unless and until that prisoner has provided officials with a specific waiver agreeing to return if a retrial is granted.

This new "requirement" devised by the New Hampshire Supreme Court needlessly adds a level of substantial burden, complexity, and bureaucracy for persons under the IAD. Significantly, it resulted in a 22-month delay for Mr. Cross in this case. Moreover, it directly conflicts with the decisions in other jurisdictions. *See State* v. *Jefferson*, 574 A.2d 918, 918-19 (Md. Ct. App. 1990)(noting that the IAD does not provide for retaining a prisoner following conviction and sentencing even where the prisoner has appealed invoking his right to an automatic new trial); *Joubert* v. *McKernan*, 588 A.2d 748, 751 (Me. 1991)(the IAD requires a prisoner be returned to the sending state immediately after sentencing, even if the prisoner has appealed and wishes to remain in the receiving state pending the appeal); *State* v. *Grizzell*, 399 So.2d 1091, 1092 (Fla. Dist. Ct. App. 1981)(IAD does not provide for retaining prisoner in the receiving state during the post-trial appeal period). *See also Shanks* v. *Commonwealth*, 574 S.W.2d 688, 690 (Ky. Ct. App. 1978)(returning prisoner to the sending state during the period between a mistrial and a subsequent retrial does not trigger the anti-shuttling provisions

of the IAD, since the IAD's requirement of a "trial" is satisfied); *Wilkett* v. *State*, 753 P.2d 383, 387 (Okla. Crim. App. 1988)(same); *United States* v. *Evans*, 423 F. Supp. 528, 532 n.7 (S.D.N.Y. 1976) (same).

The New Hampshire Supreme Court's decision in this case also creates, out of whole cloth, a new and potentially onerous requirement for the state -- one that handcuffs prison authorities by stripping them of their automatic (and mandatory) ability to return prisoners to the sending states pending appeal. At the same time, this new requirement gives prisoners critical ammunition to use against the receiving state, by suggesting that the prisoner's initial IAD waiver of extradition is somehow limited. For these reasons, too, this Court should review the New Hampshire Supreme Court's rewriting of this interstate compact.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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Counsel of Record
John R. Baraniak, Jr.
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NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press.

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
No. 93-022

WAYNE F. CROSS

v.

WARDEN, NEW HAMPSHIRE STATE PRISON

June 27, 1994

Ropes & Gray, of Boston, Massachusetts (Mark P. Szpak and John R. Baraniak, Jr. on the brief, and Mr. Szpak orally), for the plaintiff.

Jeffrey R. Howard, attorney general (William C. McCallum, assistant attorney general, on the brief, and Lucy C. Hodder, assistant attorney general, orally), for the defendant.

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BROCK, C.J. The petitioner, Wayne F. Cross, appeals from an order of the Superior Court (Goode, J.) dismissing his petition for writ of habeas corpus, declaratory judgment, and injunctive relief. He contends that New Hampshire authorities wilfully violated the Interstate Agreement on Detainers (IAD), RSA chapter 606-A (1986), by detaining him in the State during the pendency of his appeal, effectively penalizing him for exercising his right to appeal and violating his rights to due process and equal protection under the State and Federal Constitutions. We affirm.

In late 1982, the petitioner twice robbed the Village Savings Bank in New Ipswich. Hillsborough County authorities subsequently learned that the petitioner was incarcerated at the Massachusetts Correctional Institute in Norfolk, Massachusetts. There, he was participating in alcohol abuse education and a rehabilitation program that included training as an electrician. On November 9, 1983, the petitioner availed himself of the IAD to "request for a final disposition to be made of the indictment" pending against him in New Hampshire regarding the 1982 bank robberies. See RSA 606-A:1; art. III(a). He was thereupon transferred to the New Hampshire State Prison; on December 5, 1984, he was convicted on two counts of bank robbery after nearly a year of pretrial and trial delays. After he was sentenced to two consecutive terms of imprisonment at the New Hampshire State Prison on February 8, 1985, he filed a direct appeal to this court. His convictions were affirmed on December 5, 1986, State v. Cross, 128 N.H. 732, 733, 519 A.2d 272, 273 (1986), and he was returned to Massachusetts custody approximately five days later.

In May 1992, upon the imminent completion of his Massachusetts sentence, the petitioner was transported back to the New Hampshire State Prison to serve the remainder of his New Hampshire sentences. He filed a petition for writ of habeas corpus, declaratory judgment, and injunctive relief, alleging that State authorities had wilfully breached the requirements

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of RSA 606-A:1, art. V(e) by not returning him to Massachusetts custody during the pendency of his direct appeal of his bank robbery convictions to this court. The trial court dismissed his petition and this appeal followed.

On an appeal from an order granting a motion to dismiss, we assume the truth of both the facts alleged in the plaintiff's pleadings and all reasonable inferences therefrom as construed most favorably to the plaintiff. If the facts as alleged would constitute a basis for legal relief, the motion to dismiss should be denied. Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318, 320, 499 A.2d 999, 1000 (1985).

All of the petitioner's arguments stem from his claim that State authorities violated RSA 606-A:1, art. V(e). He argues that the IAD expressly requirements that a prisoner "must be returned to the sending state at the earliest practicable time following trial," and that the purpose of the IAD, "to ensure a speedy return and thus minimize disruption in the prisoner's program of rehabilitation in the sending state," was "eviscerated" by the violation. Accordingly, we consider whether the State violated the requirement of RSA 606-A:1, art. V(e). RSA 606-A:1, art. V(e) reads: "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

"In interpreting a statute, we will ascribe to statutory words and phrases their usual and common meaning, unless the statute itself suggests otherwise." Appeal of Campton School District, 138 N.H. ____, ____, 639 A.2d 241, 242 (1994) (quotation and brackets omitted). The usual and common meaning of "practicable" is synonymous with "possible" or "feasible"; the meaning of "consonant" is synonymous with "consistent" or "compatible." See Webster's Third New International Dictionary 485, 1780 (unabridged ed. 1961). We note that the drafters of the IAD did not choose to place a specific time restriction upon the prosecuting authority

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here as they did in other sections of the statute. Cf. RSA 606-A:1, art. III(a), art IV(c).

While specific provisions of the IAD are intended to encourage the efficient administration of prisoner rehabilitation programs, other purposes of the statute provide for the cooperative administration of the interstate criminal justice system. Article I of the statute reads:

> "The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures."

RSA 606-A:1, art. I (emphasis added).

We have stated that the purpose of the IAD is "to give formal recognition to the practice of honoring detainers filed by other states

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against prisoners confined in this state and to provide for trial here of persons serving sentences in other states prior to the expiration of their sentences there," Allen v. Hancock, 109 N.H. 254, 255, 248 A.2d 632, 632 (1968), and "to secure the speedy trial of persons incarcerated in jurisdictions that enacted similar statutes," Petition of Lemieux, 109 N.H. 258, 259, 248 A.2d 634, 635 (1968). See also Carchman v. Nash, 473 U.S. 716, 720, 729-32 (1985). In this case, we interpret RSA 606-A:1, art. V(e) to mean that the petitioner shall be returned to Massachusetts at the earliest possible time consistent with the expeditious and orderly disposition of the bank robbery charges against him.

The State argues that the petitioner was not returned to Massachusetts prior to the completion of his appeal because prosecuting authorities were concerned over the adequacy of his waiver of extradition between February 1985 and December 1986. Further, they were concerned that if the petitioner were returned to Massachusetts and if a successful appeal resulted in a new trial, the anti-shuttling provisions of the IAD, see RSA 606-A:1, art. III(d), would effect a dismissal with prejudice. The State concludes that the delay in returning the petitioner to Massachusetts was necessary for the orderly disposition of the bank robbery charges against him. We agree.

On November 9, 1983, the petitioner signed a standard form waiver in connection with his IAD request. The waiver reads, in pertinent part:

> "I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or

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> proceeding contemplated hereby or included herein, and waiver of extradition to your state to serve any sentence there imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which I am now confined."

(Emphasis added.) See RSA 606-A:1, art. III(e).

Subsequent to the petitioner's sentencing in February 1985, county authorities informed his counsel that they intended to hold him in the State pending the outcome of his appeal, due to the inadequacy of the waiver. Not until June 1986 did the petitioner, through counsel, indicate his willingness to sign "whatever waivers are required to effect his transfer to Massachusetts." In October 1986, the petitioner moved for his return to Massachusetts; the State objected to the motion absent the petitioner's "specific waiver that he would agree to be returned to the State . . . for trial if [his] appeal . . . results in a new trial being ordered." In December 1986, the petitioner's conviction was affirmed, and he was returned to Massachusetts. His motion was subsequently dismissed as moot.

By its plain language, the signed waiver operated as a waiver of extradition with respect to any proceeding necessary for the final disposition of the untried bank robbery indictment. The petitioner points to RSA 606-A:1, art. V(d), however, and argues that the custody afforded by the IAD expires once an indictment has been "tried." RSA 606-A:1, art. V(d) states, in pertinent part:

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> "The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction."

Further, he argues that an indictment has been "tried" either upon completion of the trial itself or upon sentencing; he rejects any suggestion that an indictment is "tried" only upon the completion of post-sentencing appeals.

We need not decide in this case when the "final disposition of an untried indictment" occurs since we find that the State's concern over the petitioner's extradition waiver was justified. Assuming arguendo the petitioner is correct that an indictment is "tried" prior to the completion of post-sentencing appeals, then the petitioner's waiver of extradition might have been insufficient in the event of a successful appeal and new trial. Had the petitioner been returned to Massachusetts after his indictment had been "tried," the State would have had to lodge a second detainer against him in order to retried him for the second trial. See Shanks v. Com., 574 S.W.2d 688, 690 (Ky. Ct. App. 1978); State v. Jefferson, 319 Md. 674, 683-84, 574 A.2d 918, 922 (1990). The State would have been forced to seek a second extradition waiver, which the petitioner might not have signed. Cf. RSA 606-A:1, art. IV(d).

Alternatively, assuming arguendo that the "final disposition of an untried indictment" includes the completion of all related proceedings, then the anti-shuttling provisions of the IAD might have served to dismiss the

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indictment had the petitioner been returned to Massachusetts and a new trial ordered. RSA 606-A:1, art III(d) reads in pertinent part:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

"The firm rules from the foregoing statutes are . . . that return of the prisoner to the custodial sending State works a dismissal of all undisposed charges." State v. McGann, 126 N.H. 316, 320-21, 493 A.2d 452, 455-56 (1985). In either case, the State might be deprived of the ability to retry the petitioner on the bank robbery charges. Such a result would run counter to the purpose of an "orderly disposition" of the charges against the petitioner.

Absent the petitioner's specific waiver agreeing to be returned to the State if his appeal resulted in a new trial, we conclude that the State was justified in delaying his return to Massachusetts. The petitioner was returned to Massachusetts at the earliest possible time consistent with the expeditious and orderly disposition of the bank robbery charges against him. Accordingly, we conclude that the State did not violate the requirements of RSA 606-A:1, art. V(e). Further, we reject the defendant's argument that such a construction of the IAD violates his rights to due process and equal protection under the State and Federal Constitutions. The defendant was retained in the State not because he exercised his right to appeal, but because he failed to execute a specific waiver. Under the facts of this case, we find no violation of the defendant's constitutional rights.

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Affirmed.

THAYER, J., did not sit; the others concurred.

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 93-022, Wayne F. Cross v. Michael Cunningham, Warden, the court upon July 28, 1994, made the following order:

Plaintiff's motion for rehearing is denied.

Distribution:

Mark P. Szpak, Esquire
William C. McCullum, Esquire
Hillsborough County (N) Superior Court 92-E-562
Hon. Frederick D. Goode
Theresa Hayes, Supreme Court
File

Howard J. Zibel,
Clerk

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT
NORTHERN DISTRICT OF HILLSBOROUGH COUNTY

John M. Safford, Clerk
300 Chestnut Street
Manchester, N.H. 03101-2490
(603) 669-7410

December 10, 1992

NOTICE OF DECISION

No: 92-E-562

Wayne Cross v. Michael Cunningham, Warden

You are hereby notified that on November 20, 1992 the following order was entered in the above matter:

RE: Respondent's Motion to Dismiss

(SEE COPY OF RULING ATTACHED HERETO)
(Goode, J.)

JMS/jtb

Copy to: Mark P. Szpak, Esq.
ROPES & GRAY
One International Place

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William C. McCallum, Esq.
STATE OF NH-DEPARTMENT OF JUSTICE
State House Annex
Concord, NH 03301

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY

SUPERIOR COURT

92-E-562

Wayne F. Cross

v.

Michael Cunningham, Warden

RULING

Defendant's memorandum in support of his motion to dismiss is adopted by this Court as an accurate statement of the facts and applicable law. The motion to dismiss is accordingly GRANTED.

Dated: November 20, 1992

FREDERICK D. GOODE,
Presiding Justice

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, ss. APRIL TERM, 1992

SUPERIOR COURT

WAYNE F. CROSS

v.

MICHAEL CUNNINGHAM,
WARDEN OF THE NEW HAMPSHIRE STATE PRISON,

PETITION FOR WRIT OF HABEAS CORPUS, AND FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Introduction

This is an action for a Writ of Habeas Corpus pursuant to R.S.A. 534, and for declaratory and injunctive relief pursuant to R.S.A. 491:22 and 498:1-2, by and on behalf of petitioner Wayne F. Cross. The action arises from conduct by New Hampshire authorities in willful violation of Mr. Cross's rights under the Interstate Agreement on Detainers, R.S.A. 606-A ("IAD") and the New Hampshire and United States Constitutions. As set forth in more detail below, New Hampshire obtained jurisdiction pursuant to the IAD to try Mr. Cross on certain criminal charges in late 1984 and (following conviction) imposed a sentence. However, New Hampshire authorities then refused to return him to Massachusetts "at the earliest practicable time" following his trial, in direct contravention of the

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mandates of the IAD, and despite repeated requests by and on behalf of Mr. Cross that the IAD be complied with. Instead, New Hampshire authorities continued his incarceration in New Hampshire for 22 months while an appeal of his conviction remained pending, thus penalizing Mr. Cross for taking and continuing the appeal. This petition accordingly seeks (a) a declaratory judgment that by virtue of these breaches and infringements of Mr. Cross's fundamental rights, New Hampshire authorities lost their jurisdiction to continue to enforce the conviction and sentence, and (b) orders by the Court issuing a Writ of Habeas Corpus and otherwise affording Mr. Cross due relief by vacating his conviction and sentence (or such portions as remain) and requiring that all restraints flowing therefrom be removed.

Parties

1. Petitioner, Wayne F. Cross, is an individual who is currently an inmate at the New Hampshire State Prison in Concord, New Hampshire.

2. The respondent, Michael Cunningham, is Warden of the New Hampshire State Prison in Concord, New, Hampshire.

Jurisdiction

3. Jurisdiction is founded on R.S.A. 534:1, 534:22, 491:22, 498:1 and 498:2.

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Facts

4. In 1983, Mr. Cross was serving a sentence at the Massachusetts Correctional Institution at Norfolk, Massachusetts ("MCI-Norfolk") pursuant to a Massachusetts conviction.

5. While in prison in Massachusetts, Mr. Cross was participating in a rehabilitation program that included, inter alia, the opportunity to acquire training and experience in his trade as an electrician. Mr. Cross was actively involved in this program, earning credits towards an electrician's license through a course of schooling and through work experience under the direction of a licensed master electrician. He was also involved in an alcohol abuse program.

6. In the latter part of 1983, New Hampshire authorities in Hillsborough County began to attempt to secure jurisdiction to prosecute certain criminal charges against Mr. Cross. They did so by lodging a detainer/warrant against him with M.C.I.-Norfolk in Massachusetts. Upon learning of the detainer/warrant, Mr. Cross in November of 1983 invoked the protections afforded by the IAD (to which both New Hampshire and Massachusetts are parties) to obtain a speedy trial of the charges underlying the detainer/warrant. A copy of Mr. Cross's IAD request is attached hereto at Exhibit A ("Form 2").

7. The IAD is in effect in New Hampshire pursuant to R.S.A. 606-A:1. As set out in Article I of the statute, the IAD was enacted to avoid the disruption in prisoner rehabilitation that results from the imposition of detainers arising from charges in other jurisdictions. It provides, in Article III(a), that prisoners may request that they be sent to a state where charges

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are pending for the purpose of a prompt and speedy trial of the charges. In invoking the IAD, for example, Mr. Cross specifically agreed to a "waiver of extradition with respect to any charge or proceeding contemplated [t]hereby," and "consent[ed] . . . to the production of [his] body in any court where . . . required in order to effectuate the purposes of the Agreement on Detainers," as set forth in Exhibit A ("Form 2"). In turn, the IAD requires, in Articles V(d) and (e), that the receiving state must return the prisoner to the state from which he was sent "[a]t the earliest practicable time" following trial, to allow the prompt resumption of rehabilitative and other programs. In New Hampshire, all departments, officers and employees of the state are specifically charged with the enforcement of the IAD, by mandate of the legislature set forth in R.S.A. 606-A:3.

8. New Hampshire accepted jurisdiction over Mr. Cross under the IAD. A copy of MCI-Norfolk's "Offer to Deliver Temporary Custody" (which references Article V of the IAD), and a copy of New Hampshire's acceptance, are attached hereto at Exhibit A ("Form 4" and "Form 7," respectively). On or about December 19, 1983, Mr. Cross was transported to New Hampshire. A public defender was appointed to represent him. For the entire period while awaiting trial, Mr. Cross was confined, under maximum security, in the New Hampshire State Prison in Concord, New Hampshire.

9. On or about November 26, 1984, trial commenced in the Hillsborough County Superior Court, in Docket Nos. 83-1456 and 83-1457. On December 5, 1984, Mr. Cross was found guilty on each of the

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two counts, which conviction was subsequently appealed.

10. On or about February 8, 1985, the petitioner was sentenced by the Hillsborough County Superior Court to 7 1/2 to 15 years on each count consecutively (hereinafter collectively referred to as "the sentence"). He was ordered immediately committed to the New Hampshire State Prison. Copies of the mittimuses are attached hereto at Exhibit B. The Sheriff of Hillsborough County delivered the petitioner to the Warden of the New Hampshire State Prison pursuant to the above-mentioned mittimuses.

11. However, the Warden of the New Hampshire State Prison, respondent Michael Cunningham, thereupon made no efforts whatsoever to arrange for any return of Mr. Cross to Massachusetts. This occurred even though a) the imposition of the sentence concluded the trial proceedings on the charges on which Mr. Cross had been brought to New Hampshire, b) his presence in New Hampshire was no longer necessary since all trial proceedings, including the sentencing, had been completed, c) the IAD expressly required that he be returned to M.C.I.-Norfolk in Massachusetts "at the earliest practicable time" following the conclusion of his trial, and d) under R.S.A. 606-A:5, the New Hampshire legislature specifically provided that the warden has a "mandatory" duty to "give over" any prisoner held by him "whenever so required by the operation of the agreement on detainers."

12. Instead, New Hampshire authorities, including, without limitation, Paul A. McDonough, the Assistant County Attorney in Hillsborough County who had prosecuted Mr. Cross, and respondent Cunningham (himself and/or through his employees), had specifically

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determined to retain Mr. Cross in New Hampshire because Mr. Cross had exercised his right to pursue an appeal of his conviction. Mr. McDonough admitted this fact in a conversation with the public defender for Mr. Cross on or about February 19, 1985, which was memorialized in a February 20, 1985 letter from the public defender to Mr. McDonough, a copy of which is attached hereto as Exhibit C. Mr. McDonough now claimed that Mr. Cross's IAD waivers were sufficient to bring him to New Hampshire for trial but somehow insufficient to return him to Massachusetts "at the earliest practicable time" thereafter -- solely due to Mr. Cross's exercise of his rights of appeal.

13. Mr. Cross and counsel on his behalf objected repeatedly to this wrongful refusal to return Mr. Cross to Massachusetts. For example, on March 6, 1985, counsel for Mr. Cross demanded by letter to Mr. McDonough that Mr. Cross be returned to Massachusetts pursuant to Article V of the IAD. A copy of this letter is attached as Exhibit D. The demand was unavailing.

14. Mr. Cross continued to pursue his interest in being returned to Massachusetts. In August of 1985, he specifically inquired about the status of his prospective return. However, Mr. Cross was told by the Administrator of Offender Records for the New Hampshire State Prison, Joseph C. Wehrle, that "[t]he County Attorney was keeping you in NH until your appeal was completed." A copy of Mr. Cross's inquiry and Mr. Wehrle's response is attached hereto as Exhibit E.

15. Independent efforts to transfer Mr. Cross to Massachusetts were similarly rejected. In mid-March, 1986, the District Attorney in Middlesex

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County in Massachusetts requested temporary custody of Mr. Cross to have him stand trial in that county on other charges. The request -- a copy of which is attached as Exhibit F -- was addressed directly to respondent Cunningham. However, personnel in the Hillsborough County Attorney's office continued to refuse Mr. Cross's transfer back to Massachusetts pending Mr. Cross's appeal, and so informed Middlesex County authorities. A copy of the correspondence confirming this response is attached as Exhibit G.

16. As contacts continued, counsel for Mr. Cross then specifically wrote to Mr. McDonough in the Hillsborough County Attorney's office, on June 24, 1986. The letter stated that Mr. Cross would "sign whatever waivers are required to effect his transfer to Massachusetts authorities," and asked that any further waiver form that was necessary be sent directly to Mr. Cross for him to execute. A copy of this letter is attached as Exhibit H. Mr. McDonough made no response. Again, this effort to secure the New Hampshire authorities' compliance with the IAD was totally unavailing.

17. In July of 1986, Mr. Cross filed a motion pro se in the Hillsborough County Superior Court to have the public defender who had represented him in his trial reappointed to represent him in connection with his effort to be returned to Massachusetts in compliance with the IAD. Upon reappointment, Mr. Cross's counsel then made an appropriate motion with the Court in the original criminal action, Docket Nos. 83-1456 and 1457, for enforcement of the IAD requirement that Mr. Cross be returned. A copy of the motion is attached hereto as Exhibit I.

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18. However, the Warden of the New Hampshire State Prison and the Hillsborough County Attorney's Office continued to fail and refuse to take any steps to allow or facilitate Mr. Cross's return to the relevant authorities in Massachusetts. In particular, the Hillsborough County Attorney's Office opposed the motion by claiming that Mr. Cross had given insufficient waivers to allow him to be returned -- despite the full IAD waivers given by Mr. Cross in the IAD "Form 2" by which New Hampshire had accepted jurisdiction over him, and despite Mr. Cross's counsel's direct, written statement to Mr. McDonough months earlier that Mr. Cross would "sign whatever waivers are requested" and asking that any necessary form be sent to Mr. Cross for his signature. A copy of the opposition, signed by Mr. McDonough, is attached hereto as Exhibit J.

19. On December 5, 1986, before the motion could be resolved, the New Hampshire Supreme Court rendered a decision on Mr. Cross's appeal of his criminal conviction. The conviction was affirmed.

20. At that juncture, the Warden of the New Hampshire State Prison finally allowed Mr. Cross to be transferred back to Massachusetts. The re-transfer to Massachusetts occurred on or about December 10, 1986 -- twenty-two months following the imposition of sentence to complete the trial proceedings. The motion that had been filed to obtain a re-transfer was thereupon dismissed as moot, as reflected in the attached Exhibit K.

21. The twenty-two month refusal by the Warden of the New Hampshire State Prison -- acting himself and in cooperation with Hillsborough County authorities -- to return Mr. Cross to Massachusetts caused a severe and undue disruption to Mr. Cross's rehabilitation program.

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For example, the New Hampshire State Prison did not have a training program in the electrical trade in which Mr. Cross could participate. Therefore, Mr. Cross lost approximately 2400 hours of credits that he would otherwise have had an opportunity to earn in pursuing his electrician's license. Also, because of a lack of comparable opportunities while incarcerated in the New Hampshire State Prison, Mr. Cross was precluded for the duration of his stay from continuing his school enrollment and participation in an alcohol abuse program. The retention further interfered with Mr. Cross's efforts to contend with charges pending against him in Massachusetts. The undue and substantial disruption that Mr. Cross suffered is precisely what the IAD (as specifically adopted by the New Hampshire legislature) was intended to prevent, and what New Hampshire authorities agreed to avoid by agreeing to take jurisdiction over Mr. Cross pursuant to the IAD's terms and conditions.

22. Subsequently, on December 18, 1987, New Hampshire authorities took steps to continue to enforce Mr. Cross's conviction and sentence, by causing a detainer to be lodged at M.C.I.-Norfolk in Massachusetts for Mr. Cross's return to New Hampshire to serve out his sentence on the New Hampshire offenses following completion of his sentence in Massachusetts. A copy of the detainer (with a copy of the December 18, 1987 letter from New Hampshire authorities) is attached hereto at Exhibit L. Upon the imminent completion of Mr. Cross's Massachusetts sentence, New Hampshire authorities invoked the detainer and on May 22, 1992, transported Mr. Cross back to the New Hampshire

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State Prison in Concord for service of such portion of his New Hampshire sentence as remains.

Count I

(Violation of Interstate Agreement on Detainers, R.S.A. 534)

23. Petitioner hereby repeats and realleges paragraphs 1 though 22 of the petition as if alleged herein.

24. By virtue of the conduct and events set forth above, New Hampshire authorities wilfully breached the requirements of Articles V (d) and (e) of the Interstate Agreement on Detainers, R.S.A. 606-A:1, Article V(d) and (e). This breach constituted a breach of the agreed-upon terms under which they obtained jurisdiction over Mr. Cross. As a result, the jurisdiction of New Hampshire authorities to continue to enforce the conviction and sentence was nullified. The restraint on Mr. Cross imposed by the pendency of the conviction and sentence is therefore without sufficient cause or due order of law.

25. Petitioner accordingly requests that the Court afford the petitioner such relief as is just and appropriate, including, without limitation:

a) a Writ of Habeas Corpus pursuant to R.S.A. 534:1 and 534:22 mandating that all such restraints be discharged forthwith;

b) a declaratory judgment pursuant to R.S.A. 491:22 that Mr. Cross's conviction and sentence are null and void, and vacating them (or such portion of the sentence as remains) accordingly; and

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c) a preliminary and permanent injunction pursuant to R.S.A. 498:1-2 enjoining continued enforcement of the conviction and any remainder of the sentence.

Count II

(Violation of New Hampshire and Federal Constitutional Rights)

26. Petitioner hereby repeats and realleges paragraphs 1 though 25 of the petition as if alleged herein.

27. The protections afforded by the New Hampshire legislature through its adoption of the Interstate Agreement on Detainers, R.S.A. 606-A are of constitutional dimension, in that the IAD is specifically intended to advance and protect prisoners' interests in rehabilitation, the special significance of which is set out in Article XVIII of Part 1 of the New Hampshire Constitution. New Hampshire authorities deprived Mr. Cross of the benefit of these protections in this case. In refusing to honor Mr. Cross's right to be returned to Massachusetts under the IAD as set forth above, moreover, New Hampshire authorities imposed a burden on Mr. Cross that penalized him for exercising his right to seek an appeal of his criminal conviction. Through the imposition of this penalty, thus, New Hampshire authorities not only violated the IAD, but also unfairly discriminated against Mr. Cross and otherwise violated his fundamental rights to due process, equal protection, and other interests under Articles XII, XIV, XV, and XVIII of Part I of the New Hampshire Constitution, and his fundamental rights to due process, equal protection, and otherwise under the Fourteenth Amendment of the United States Constitution.

[Reprinted From Original]

28. Petitioner accordingly requests that the Court afford the petitioner such relief as is just and appropriate, including, without limitation:

a) a Writ of Habeas Corpus pursuant to R.S.A. 534:1 and 534:22 mandating that all such restraints be discharged forthwith;

b) a declaratory judgment pursuant to R.S.A. 491:22 that Mr. Cross's conviction and sentence are null and void, and vacating them (or such portion of the sentence as remains) accordingly; and

c) a preliminary and permanent injunction pursuant to R.S.A. 498:1-2 enjoining continued enforcement of the conviction and any remainder of the sentence.

Count III

(Violation of 42 U.S.C. § 1983)

29. Petitioner hereby repeats and realleges paragraphs 1 though 28 of the petition as if alleged herein.

30. The Interstate Agreement on Detainers, as adopted by the various states, is an interstate compact authorized by Congress that has the force and effect of federal law. The violation of the terms and conditions of the IAD described above constituted a violation of fundamental rights afforded to Mr. Cross under the IAD and/or the Fourteenth Amendment of the United States Constitution, and resulted from actions and conduct by respondent Cunningham, Hillsborough Assistant County Attorney McDonough and/or other New Hampshire authorities acting under color of

[Reprinted From Original]

state law. Mr. Cross is thus entitled to relief from the Court under 42 U.S.C. § 1983.

31. Petitioner accordingly requests that the Court afford the petitioner such relief as is just and appropriate pursuant to 42 U.S.C. § 1983, including, without limitation:

a) a Writ of Habeas Corpus pursuant to R.S.A. 534:1 and 534:22 mandating that all such restraints be discharged forthwith;

b) a declaratory judgment pursuant to R.S.A. 491:22 that Mr. Cross's conviction and sentence are null and void, and vacating them (or such portion of the sentence as remains) accordingly; and

c) a preliminary and permanent injunction pursuant to R.S.A. 498:1-2 enjoining continued enforcement of the conviction and any remainder of the sentence.

WHEREAS, PETITIONER WAYNE F. CROSS PRAYS that the Court grant him the following relief:

1. A Writ of Habeas Corpus, pursuant to Counts I, II and III;
2. A Declaratory Judgement, pursuant to Counts I, II and III;
3. A Preliminary and Permanent Injunction, pursuant to Counts I, II and III;
4. Costs and attorneys fees to the fullest extent available under each of the counts herein, including, without limitation, under 42 U.S.C. § 1988; and

[Reprinted From Original]

5. Such other and further relief as the Court deems just and proper.

WAYNE F. CROSS

By his attorneys,

Mark P. Szpak

Mark P. Szpak
ROPES & GRAY
One International Place
Boston, Massachusetts 02110
(617) 951-7606

Dated: July 20, 1992

[Reprinted From Original]

STATEMENT OF SUBMISSION UNDER OATH

I, Wayne F. Cross, hereby certify that I have read the above Petition, and hereby state, under oath, that the facts set forth therein are true to the best of my knowledge, information, and belief.

Wayne F. Cross
Wayne F. Cross

Dated: July 13, 1992

[Reprinted From Original]

Form 4

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In case of a request initiated by a prosecutor this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30-day period. Copies of this Form should be sent to all officials who previously received copies of Form 3. One copy also should be given to the prisoner and one copy should be retained by the warden. Copies mailed to the prosecutor should be sent by certified or registered mail, return receipt requested.

Agreement on Detainers: Form 4

OFFER TO DELIVER TEMPORARY CUSTODY

Date 11-9-83

TO: Raymond Cloutier Prosecuting Officer

Hillsborough County
Manchester, N.H.
(Jurisdiction)

And to all other prosecuting officers of jurisdictions listed below from which indictments, informations or complaints are pending.

RE: Wayne Cross (Inmate) Number W-34342

Dear Sir:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which

[Reprinted From Original]

is [described in the attached inmate's request][XXXX

[Reprinted From Original]

Form 2

Five copies, if only one jurisdiction within the state involved has an indictment, information or complaint pending. Additional copies will be necessary for prosecuting officials and clerks of court if obtainers have been lodged by other jurisdictions within the state involved. One copy should be retained by the prisoner. One signed copy should be retained by the warden. Signed copies must be sent to the Agreement Administrator of the state which has the prisoner incarcerated, the prosecuting official of the jurisdiction which pieced the detainer, and the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail, return receipt requested.

Agreement on Detainers: Form 2

INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR

DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS

TO: Raymond Cloutier Prosecuting Officer — Hillsborough County, Manchester, N.H. (Jurisdiction)

John M. Safford, Clerk Hillsborough Superior Court — Hillsborough County Manchester, N.H. (Jurisdiction)

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

You are hereby notified that the undersigned is now imprisoned in Massachusetts Correctional Institution (Institution) at Norfolk, Massachusetts (town and state)

[Reprinted From Original]

and I hereby request that a final disposition be made of the following indictments, informations or complaints now pending against me:

Failure to take action in accordance with the Agreement on Detainers, to which your state is committed by law, will result in the invalidation of the indictments, information or complaints.

I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or proceeding contemplated hereby or included herein, and waiver of extradition to your state to serve any sentence there imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the proposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which I now am confined.

If jurisdiction over this matter is properly in another agency, court or officer, please designate the proper agency, court or officer and return this form to the sender.

The required Certificate of Inmate Status and Offer of Temporary Custody are attached.

DATED: 11-9-83

Wayne Cross W-34342
(Inmate's name and number)

The inmate must indicate below whether he has counsel or wishes the court to appoint counsel for purposes of any proceedings preliminary to trial which may take place before his delivery to the jurisdiction in which the indictment, information or complaint is pending. Failure to list the name and address of counsel will be construed to indicate the inmate's

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consent to the appointment of counsel by the appropriate court in the receiving state.

A. My counsel is _____
(name of counsel)

whose address is _____
(street, city and state)

B. I request the court to appoint counsel.

Wayne Cross
(Inmate's signature)

[Reprinted From Original]

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the request, use Form 8. Copies of Form 7 should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

Agreement on Detainers: Form 7

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINER.

TO: Arnold N. Bettencourt Massachusetts Correctional Institution
Deputy XXXX (Institution)
Superintendent XXXX

Box 43, Norfolk, MA 02056
(Address)

In response to your letter of November 9, 1983 and offer of
(Date)

temporary custody regarding Wayne Cross who is presently
(Name of Prisoner)

under indictment, XXXXXXXXXX in the Hillsborough County of which
(Jurisdiction)

I am Assistant County Attorney please be advised that I accept
(Title of Prosecutor Office)

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temporary custody and that I propose to bring this person to trial on the indictment, information or complaint named in the offer within the time specified in Article III(a) of the Agreement of Detainers.

COMMENTS: If your jurisdiction is the only one named in the offer of temporary custody, use the space below to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquiry as to the order in which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.

Signed: Paul A. McDonough
Paul A. McDonough, Esquire
Title: Assistant County Attorney

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: 12-2-83

Signed: Joseph A. DiClerico, Jr.
(Judge)

Hillsborough County Superior Court
(Court)

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THE STATE OF NEW HAMPSHIRE

Hillsborough County Superior Court

STATE vs. .....Wayne F. Cross.....St. # 83-1456.....
Indictment [X] Waiver [ ] Information [ ] Complaint [ ]

ARRAIGNMENT

Date.....November 26, 1984..... Plea..Not Guilty.....

DISPOSITION

Date.....February 8, 1985..... Justice..Arthur E. Bean, Jr..
Plea [ ] Jury Verdict [X] Court Order [ ]
Finding: Guilty [X] Not Guilty [ ] Other [ ]
SENTENCE: The defendant is sentenced to not more than 15 years nor less than 7 1/2 years at the N.H. State Prison with 420 days of pre-trial confinement credit. Stand committed. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of defendant's sentence, to be pro-rated for any part of the year. R.S.A. 651:2, II-e.

Date...February 8, 1985..... ...John M. Safford....Clerk

MITTIMUS

The Sheriff of Hillsborough County is hereby ordered to deliver:

.....Wayne Cross.....
to: [X] New Hampshire State Prison, Concord, New Hampshire
[ ] Hillsborough County House of Correction
Goffstown, New Hampshire
in accordance with said sentence.

Attest:
...John M. Safford....Clerk

[Reprinted From Original]

RETURN

Pursuant, to said order, I delivered: ....Wayne Cross.....
to: [X] New Hampshire State Prison, Concord, New Hampshire
[ ] Hillsborough County House of Correction
Goffstown, New Hampshire
and gave the
[X] warden
[ ] superintendent
a copy of this order.

Date....Feb. 8, 1985..... .....[NAME].....Deputy Sheriff

Copies:
Department of Safety
Probation Department
Sentence Review Division
County Attorney
Jailer

[Reprinted From Original]

THE STATE OF NEW HAMPSHIRE

Hillsborough County Superior Court

STATE vs. ..Wayne F. Cross.....St. # 83-1457.....
Indictment [X] Waiver [ ] Information [ ] Complaint [ ]

ARRAIGNMENT

Date.....November 26, 1984..... Plea..Not Guilty.....

DISPOSITION

Date.....February 8, 1985..... Justice..Arthur E. Bean, Jr..
Plea [ ] Jury Verdict [X] Court Order [ ]
Finding: Guilty [X] Not Guilty [ ] Other [ ]
SENTENCE: The defendant is sentenced to not more than 15 years nor less than 7 1/2 years at the N.H. State Prison with 420 days of pre-trial confinement credit. Stand committed. This sentence to run consecutive to that imposed on 83-1456. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of defendant's sentence, to be pro-rated for any part of the year. R.S.A. 651:2, II-e.

Date...February 8, 1985..... ...John M. Safford....Clerk

MITTIMUS

The Sheriff of Hillsborough County is hereby ordered to deliver:

.....Wayne Cross.....
to: [X] New Hampshire State Prison, Concord, New Hampshire
[ ] Hillsborough County House of Correction
Goffstown, New Hampshire
in accordance with said sentence.

Attest:
...John M. Safford....Clerk

[Reprinted From Original]

RETURN

Pursuant, to said order, I delivered: ....Wayne Cross.....
to: [X] New Hampshire State Prison, Concord, New Hampshire
[ ] Hillsborough County House of Correction
Goffstown, New Hampshire
and gave the
[X] warden
[ ] superintendent
a copy of this order.

Date....Feb. 8, 1985..... .....[NAME].....Deputy Sheriff

Copies:
Department of Safety
Probation Department
Sentence Review Division
County Attorney
Jailer

[Reprinted From Original]

PUBLIC DEFENDER PROGRAM
NEW HAMPSHIRE LEGAL ASSISTANCE
315 Pine Street
Manchester, New Hampshire 03101

Tel. (603) 669-7888

February 20, 1985

Mr. Paul McDonough
Assistant County Attorney
300 Chestnut St.
Manchester, NH 03101

Re: Wayne Cross

Dear Paul:

This is to confirm our conversation yesterday that you intend to hold, in New Hampshire, Mr. Cross pending the outcome of his forthcoming appeal to the Supreme Court.

If there is a change in your decision please contact me.

Sincerely,

Gary S. Lenehan
Public Defender

GSL/dr

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CLIENT'S COPY

SCHWARTZ & SHAW
ATTORNEYS AT LAW
240 COMMERCIAL STREET
BOSTON, MASSACHUSETTS 02109

HARVEY A. SCHWARTZ
PAUL W. SHAW

(617) 227-2414

March 6, 1985

Paul A. McDonough
Hillsborough County
District Attorney's Office
300 Chestnut Street
Manchester, NH 03101

Re: Wayne F. Cross

Dear Mr. McDonough:

I represent Wayne F. Cross in connection with a number of matters that are pending in the Middlesex Superior Court in Cambridge, MA. During the fall of 1983, Mr. Cross was transferred to New Hampshire for trial on certain other charges pursuant to the Interstate Agreement on Detainers. I have been informed by Mr. Cross that he has been convicted and sentenced on each of those charges but is still being detained in New Hampshire.

I would address your attention to Article V(d) of the Agreement which provides that the temporary custody of Mr. Cross granted to New Hampshire only applied for the purpose of trying an indictment or complaint. As the trial has been completed, New Hampshire no longer can lawfully detain Mr. Cross under the Agreement. The Massachusetts cases have been held in abeyance for well over one year; Mr. Cross will be

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prejudiced in his defense as a result of a number of potential witnesses having left the area without providing forwarding addresses. As a result, I am formally demanding that Mr. Cross be released into the custody of the Massachusetts Department of Corrections so that he can be returned to this state for trial in Cambridge, MA.

Very truly yours,

Paul W. Shaw

PWS/laa
cc: Wayne F. Cross

Gary Lenehan
Hillsborough County
Public Defenders
315 Pine Street
Manchester, MA 03101

General Counsel
Massachusetts Department of Corrections
100 Cambridge Street
Boston, MA 02202

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SEE INSTRUCTIONS ON REVERSE SIDE

INMATE REQUEST SLIP

DATE 8/19/85

1 TO: Joseph Wherale

FROM: CROSS (Last Name) WAYNE (First Name) _____ (Middle Initial)

I (Division) 7 (Cell Number) _____ (Work Detail/School Assignment)

REMARKS: A little while back I discussed with you my sentence. When we were talking you told me that either you or someone from the Prison has contacted the Hillsbourgh County Attorny's office on a few occasions to see of my transfer back to Mass. Now that I have finished court proceedings up here in N.H. could you please relate to me what the response was from the County Attorney's office. Thank you.

Wayne Cross
Inmate's Signature

---

2 THRU CUSTODY -- Canary copy for delivery to inmate -- White copy to Classification for file. DATE 8/19/85

TO: INMATE Cross DIVISION __ CELL # 7

FROM: Offender Records

[Reprinted From Original]

REMARKS: The County Attorney was keeping you in NH until your appeal was completed.

J. White
Staff Signature

---

3 ACKNOWLEDGEMENT--Inmate retain Canary copy with reply.

DATE 8/19/85

Wayne Cross
Inmate's Signature

---

4 TO CLASSIFICATION FOR FILE--White copy

REVISED 12/15/79
CC 039

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Form 5

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator or the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

Agreement on Detainers: Form 5

REQUEST FOR TEMPORARY CUSTODY

TO: Michael Cunningham (Warden - xxxxxxxx) New Hampshire State Prison (Institution)

Box 14, Concord, New Hampshire 03301 (Address)

Please be advised that Wayne Cross who is presently an inmate of your institution, is under [indictment] [*******] in the Middlesex County (Jurisdiction) of which I am the District Attorney (Title of Prosecuting Officer)

Said inmate is therein charged with the [****] [offenses] enumerated below:

Offense

83-808 Armed Robbery

83-806-7 Assault and Battery by means of a dangerous weapon

83-805 Assault Dangerous Weapon

[Reprinted From Original]

I propose to bring this person to trial on this [indictment] [********] [******] within the time specified in Article IV(c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such persons pursuant to Article IV(a) of the Agreement on Detainers.

Signed [Name]

Title District Attorney

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

Dated: March 11, 1986 Signed [Name]
(Judge)

Middlesex Superior Court
(Court)

[Reprinted From Original]

FORM 6

Quadruplicate, all copies, signed by the prosecutor and the agent should be to the Administrator in the receiving state. After signing all copies, the Administrator should retain one for his files, send one to the warden of the institution in which the prisoner is located, and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

AGREEMENT ON DETAINERS, FORM 6
EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR THE RECEIVING STATE

Michael Fair
(Administrator of the Agreement on Detainers)

Wayne Cross is confined in New Hampshire State Prison, Concord, New Hampshire, and will be
(institution and address)
returned to this jurisdiction for trial on April 4, 1986
(date and approx hour)
in accordance with Article V(b), I have designated any of the following State Police Officers whose signature appears below as
(agent)
agent to return the prisoner.

[Name] Byrne
George L. Foley
[Name]
Joseph M. Jawlise
Donald MacPhee
(agent's signature)

Scott Harshbarger
Scott Harshbarger
District Attorney
Middlesex County

[Reprinted From Original]

TO: WARDEN

In accordance with the above representation and the provisions of the Agreement of Detainers, any of the abovenamed (agent) are hereby designated as agent for this state to return, Wayne Cross (inmate) for trial.

[Name]
(Administrator)

[Reprinted From Original]

CLIENT'S COPY

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE
DISTRICT ATTORNEY FOR MIDDLESEX COUNTY
CAMBRIDGE 02141

SCOTT HARSHBARGER
DISTRICT ATTORNEY
494-4050

April 30, 1986.

Paul Shaw, Esquire
240 Commercial Street
Boston, MA 02109

Re: Wayne Cross

Dear Paul,

Per my conversation please find a xerox copy of correspondence relative to the abovenamed individual. As I indicated to you the attached was sent Express Mail on March 18, 1986.

Mr. Whirle of the New Hampshire State Prison informed me that he is being held pending an appeal out of Hillsborough County Superior Court in Manchester, New Hampshire.

Thank you for your help in this matter of mutual concern. If you have any questions, please feel free to call me.

Very truly yours,
Leo T. Kennedy
Indictment Clerk to
the Grand Jury

[Reprinted From Original]

/mat

Attachment

cc: File
Christine McEvoy, Assistant District Attorney
Massachusetts State Police

[Reprinted From Original]

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE
DISTRICT ATTORNEY FOR MIDDLESEX COUNTY
CAMBRIDGE 02141

SCOTT HARSHBARGER
DISTRICT ATTORNEY
494-4050

March 18, 1986.

Michael Cunningham
Warden
New Hampshire State Prison
Box 14
Concord, New Hampshire 03301

Re: Wayne Cross

Dear Mr. Cunningham:

Attached please find the original form #5 and a xerox of form #6 of the Interstate Agreement on Detainers.

As is indicated on the forms, officers of the Massachusetts State Police will take custody of Mr. Cross within the next 3 weeks, if all the paperwork is in order. Please advise if Mr. Cross is going to appeal the Interstate Compact. If not the agents designated will take custody of Mr. Cross on or about April 4, 1986 and they will have the original form #6 with them at that time.

[Reprinted From Original]

Thank you for your help in this matter of mutual concern. If you have any questions please feel free to call me.

Very truly yours,

Leo T. Kennedy
Indictment Clerk
to the Grand Jury
1-617-494-4091

/mat

cc: File
ADA Chris McEvoy
Massachusetts State Police

[Reprinted From Original]

CLIENT'S COPY

Schwartz, Shaw and Griffith
Attorneys at Law

June 24, 1986

Paul A. McDonough
Hillsborough County
District Attorney's Office
300 Chestnut Street
Manchester, NH 03101

Re: Wayne F. Cross

Dear Mr. McDonough:

As you may recall, I represent Wayne Cross in connection with a number of indictments that are pending against him in Middlesex Superior Court in Cambridge, Massachusetts that arise out of an incident that took place in January 1983. Mr. Cross has attempted to arrange of this transfer back to Massachusetts to plea to these charges but to date nothing has occurred. I have personally spoken to Mr. Cross on the telephone, and he is willing to sign whatever waivers are required to effect his transfer to Massachusetts authorities. Indeed, I am aware that the Middlesex County District Attorney's Office has sent the necessary papers pursuant to the Interstate Agreement on Detainers to have correctional officials take custody of Mr. Cross.

I would appreciate your drafting the necessary paperwork to allow Mr. Cross to be transferred. If you could send the original to Mr. Cross with a copy to me, I can then review the material and have

[Reprinted From Original]

Mr. Cross execute it. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Paul W. Shaw

cc: Wayne F. Cross
P.O. Box 14
Concord, NH 03301

205 Portland Street
Boston, Massachusetts 02114
617 227 2414

[Reprinted From Original]

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SEPTEMBER TERM, 1986

SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

VS.

WAYNE CROSS

MOTION TO RETURN

COMES NOW the Defendant, by and through counsel, and moves this Honorable Court to order his return to the Commonwealth of Massachusetts.

AS GROUNDS for this Motion, the Defendant states as follows:

1. The Defendant was convicted of armed robbery (2 counts) after a trial by jury.

2. The Defendant was sentenced by the Honorable Justice Bean to a period of incarceration of not more than thirty (30) years nor less than fifteen (15) years at the New Hampshire State Prison.

3. The Defendant was held pretrial in the State of New Hampshire as he had waived rights under the interstate agreement on detainers prior to being transferred to this State while a prisoner in the Commonwealth of Massachusetts.

4. The Defendant's case has been completed and pursuant to the interstate agreement on detainers he should be returned to the sending State, the Commonwealth of Massachusetts.

[Reprinted From Original]

5. The Defendant has pending charges in the Commonwealth of Massachusetts and wishes to resolve those charges as expeditiously as possible.

6. The Defendant has complied with all mandates as required under the interstate agreement on detainers and his return to Massachusetts should be expedited for a resolution of pending charges in that jurisdiction.

7. A hearing on this Motion is requested.

WHEREFORE, the Defendant prays his Motion be granted and that he be transferred to the Commonwealth of Massachusetts forthwith.

Respectfully submitted,
Wayne Cross,
By his Attorneys,
BRENNAN PROFESSIONAL ASSOCIATION

DATED: October 28, 1986

By: Gary S. Lenehan
Gary S. Lenehan, Esquire
51 High Street
Manchester, NH 03101
(603) 668-8300

I HEREBY CERTIFY that a copy of the within Motion has been mailed this day to Paul McDonough, Esquire, Hillsborough County Attorneys Office.

Gary S. Lenehan
Gary S. Lenehan, Esquire

[Reprinted From Original]

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
ST. NO.

SEPTEMBER TERM, 1986
SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

V.

WAYNE CROSS

OBJECTION TO DEFENDANT'S MOTION TO RETURN

NOW COMES the State of New Hampshire by and through the Hillsborough County Attorney's Office, and objects to defendant's Motion to Return, and alleges as follows:

1. The State objects to the return of the defendant without his specific waiver that he would agree to be returned to the State of New Hampshire for trial if this appeal presently pending in the Supreme Court results in a new trial being ordered.

WHEREFORE, the State of New Hampshire respectfully prays this Honorable Court:

1. To deny the defendant's Motion for Return;
2. An for such other and further relief as may be just and proper.

DATED: October 31, 1986

Respectfully submitted,

Paul A. McDonough
Paul A. McDonough, Esquire
Assistant County Attorney

[Reprinted From Original]

I hereby certify that a copy of the within Objection has been forwarded to Gary Lenehan, Esquire, on this 31st day of October, 1986.

Paul A. McDonough
Paul A. McDonough, Esquire
Assistant County Attorney

[Reprinted From Original]

Clerk of Superior Court
Hillsborough County

JOHN M. SAFFORD, CLERK
WILLIAM S. McGRAW,
DEPUTY CLERK
BARBARA SABIN-BROWN,
DEPUTY CLERK
JAMES M. WARREN,
DEPUTY CLERK
DEPUTY CLERKS
GERTRUDE Y. RUF
MONA BERGERON

300 CHESTNUT STREET
MANCHESTER, N.H.
03101

MANCHESTER 669-7410
NASHUA AREA 494-8091

December 23, 1986

St. 83-1456-7 State v Wayne F. Cross

Paul M. Gagnon, Esq.
County Attorney
Manchester, N.H.

Gary Lenehan, Esq.
51 High Street
Manchester, N.H.

Gentlemen:

In the above entitled actions the Court (Justice Dunn) has made the following order on the Motion to Return:

[Reprinted From Original]

"December 22, 1986 Motion is moot."

Very truly yours,

Clerk of Superior Court

JMS/jj

[Reprinted From Original]

ATTACHMENT I

State of New Hampshire

DEPARTMENT OF CORRECTIONS
OFFICE OF THE COMMISSIONER
P.O. Box 769
Concord, NH 03301
603/224-3500

Ronald L. Powell, Ph.D
Commissioner

John H. Sununu
Governor

N.E. Pishon
Assistant

December 18, 1987

Superintendent Norman Butler
Massachusetts Correctional Institution
PO Box 43
Norfolk, Massachusetts 02056

RE: Cross, Wayne F.
NHSP #15114

Dear Superintendent Butler:

On February 8, 1985, the above named subject appeared in the Hillsborough County Superior Court, Manchester, New Hampshire, on two charges of Robbery. At that time subject received two 7½ to 15 year consecutive sentences, said sentences to be served concurrently with the sentence he is presently serving in Massachusetts. It is unclear whether or not at that time a copy of the mittimus was forwarded to the State of Massachusetts to be lodged as a detainer against his release from his Massachusetts sentence. I am therefore, enclosing a copy of subject's

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mittimus to be loedged as a detainer against his release together with a copy of his time sheet. We would appreciate any information you can provide concerning subject's sentences in the State of Massachusetts and his current projected release date.

Should there be any questions concerning the above, please feel free to contact me. Thank you for your cooperation in this matter.

Sincerely,

Mary E. Keniston
Deputy Compact Administrator

cc/Offender Records
file

MEK/mw

WARRANTS

MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK

NAME AND NUMBER Cross, Wayne W 43627 DATE 12-29-87

NO.	COURT OF ISSUE	TYPE OF WARRANT	CHARGE	COMPLAINT	DATE OF ISSUE	DISPOSITION
83-1457	Hillsborough County S.C. New Hampshire	mittimus 7½-15 yrs. F&A N.H. Sentence # 83-1456			12-18-87	Lodged

[You have the right to apply for a speedy trial on any untried indictment or complaint from any Court in the Commonwealth under General Laws Chapter 227 Section 72-A as Inserted by the Acts of 1963 Chapter 486]

FROM CASEWORK OF RECORDS

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SEE INSTRUCTIONS ON REVERSE SIDE

INMATE REQUEST SLIP

DATE 3/27/85

1 TO: JUDY MARUFFI

FROM: CROSS (Last Name) WAYNE (First Name) _____ (Middle Initial)

S.h.u. I (Division) 7 (Cell Number) _____ (Work Detail or School Assignment)

REMARKS: Re: Education courses in S.h.u.

Could you please advise me to any education courses available to a person confined in s.h.u. I am interested in Electrical wiring courses both residential and Industrial. Is it possible for either one of these available to see?

Wayne Cross
Inmate's Signature

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2 THRU CUSTODY -- Canary copy for delivery to inmate -- White copy to Classification for file. DATE 3-29-85

TO: INMATE Wayne Cross Division I CELL # 7

FROM: Education

REMARKS: No courses in electrical wiring

GED Prep writing, skillful writing, GEP prep

science, art

G. Crupstus
Staff Signature

---

3 ACKNOWLEDGEMENT -- Inmate retain Canary copy with reply.
DATE

W Cross
Inmate's Signature

---

4 TO CLASSIFICATION FOR FILE -- White copy

REVISED 12/15/79
CC 039

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

NORTHERN DISTRICT OF HILLSBOROUGH COUNTY

DOCKET NO. 92-E-00562

WAYNE F. CROSS

v.

MICHAEL CUNNINGHAM,
WARDEN OF THE NEW HAMPSHIRE STATE PRISON,

SUPPLEMENTAL AFFIDAVIT OF WAYNE F. CROSS

I, Wayne F. Cross, hereby depose and say as follows:

1. I am approximately 400 hours short of the credit hours of experience necessary to obtain my Massachusetts journeyman's license to work as an electrician.

2. As an inmate at MCI-Norfolk, where I was able to work as an electrician to acquire these hours toward a Massachusetts license, 400 credit hours of experience would have taken me only approximately four months to earn.

I hereby state, under oath, that the foregoing is true and correct based on my own personal knowledge.

Wayne F. Cross
Wayne F. Cross

Dated: November 18, 1992
MPSSUPAF.CW